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No. 10-1075

Supreme Court, U.S.
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In The
Supreme Court of the United States

WESLEY TRENT SNIPES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Wesley Trent Snipes's petition for certiorari ("Pet.") shows that this case presents two fundamental procedural issues bearing on enforcement of the constitutional right to be tried on criminal charges only in the proper venue by a jury selected in that venue. The government's Brief in Opposition ("BIO") does not deny the importance of either issue or that the resolution of either in petitioner's favor could change the outcome of this case. Instead, as to both questions, the government argues only that the issue was correctly decided below, and that there is no split among the circuits. As to the second issue only, the government also contends that petitioner's case is a "poor vehicle" for resolution of the question, because it arises in a plain error context. None of the government's arguments affords a persuasive reason in this case to deny review.

1. A defendant's fundamental right under Article III and the Sixth Amendment to be tried in the state and district where the crime was committed is not protected by integrating it into trial through a jury determination in the contested venue.

a. The government repeatedly argues that the constitutional right to be tried only in the proper district is fully protected by "integrating it into the trial" through a determination by the jury of the propriety of its own venue. BIO 8, 11-13. The government advances its integration-into-trial argument

to distinguish the venue and vicinage rights from the rights guaranteed by the Double Jeopardy and Self-Incrimination Clauses and the Fourth Amendment, the preservation of which the government concedes may sometimes only be ensured through a pretrial hearing. BIO 10-12.

The sole authority offered by the government in support of its integration-into-trial theory is the equally conclusory opinion of the Eleventh Circuit below that "the Sixth Amendment right to have venue proven as an element of the offense is safeguarded by integrating it into the trial." Pet. App. 19-20. But the court below also failed to provide any authority or reasoning to support the proposition that the important right protected by Article III and the Sixth Amendment to be tried only by a jury selected in a constitutionally proper venue can somehow be vindicated through a determination by a jury drawn from the very locale challenged by the defendant.

It is not surprising that neither the Eleventh Circuit nor the government was able to offer support for this novel theory, since it is directly at odds with both the historical abuses of venue against which the Framers sought to protect and this Court's interpretation of the venue provisions of Article III and the Sixth Amendment. Indeed, it is telling that the government does not even attempt to address the Framers' and this Court's historical understanding of the venue and vicinage rights, discussed at length in the Petition. Pet. 14-18.

Surely the critical rights guaranteed by the Founders could not have been vindicated by transporting a colonist across the Atlantic and "integrating" his claim that he should only be tried in the colonies into a determination of the venue question by an unsympathetic English jury. The damage to our hypothetical colonist would be inflicted as soon as he embarked for England, with the resulting hardship and prejudice, and could not be undone by later presenting the propriety of trial abroad to the contested English jury. The Framers feared the same could be true if a citizen of Georgia were forced to stand trial in a federal court in Massachusetts, and they protected against that risk when defining the right to trial by jury. The very removal of the defendant from the locale of the alleged crime to be tried in a hostile and remote forum was prejudice enough in the eyes of the Framers. The policies protected by the right could not be fully vindicated even by an acquittal, much less by a conviction in the distant district, which would not represent a reliable and impartial judgment.

Even if the improperly empanelled jury acquits the defendant, his rights have not been "preserved"; at best, the violation has proven harmless in one important respect. But even then, just as the protections of the Double Jeopardy Clause are irreparably violated where they are not vindicated *before* a defendant is haled into court a second time, *see, e.g.*, *Abney v. United States*, 431 U.S. 651, 660-62 (1977), the right to be subjected to the judgment only by a

jury of the state and district wherein the crime was committed may be irrevocably harmed the moment a defendant is haled before an improperly empanelled jury, forced to leave his home and prepare for trial there, and subjected to a distant jury's unreliable venue determination.[1]

b. "[T]he inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice. . . ." *Ex parte Milligan*, 71 U.S. 2, 123 (1866). The right to trial by jury existed in England for hundreds of years before the United States Constitution was written. *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968). The right to be tried according to a particular venue and vicinage was incorporated into the Constitution to safeguard against injustices by the Crown and Parliament known all too well to the Framers. The Declaration of

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[1] The government claims that a determination of improper venue has no double jeopardy effect because it does not represent a determination of a factual element in the defendant's favor. BIO 11 n.2. But double jeopardy may apply even where there has been no factual determination at trial. *See Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982) (double jeopardy bars reprosecution where the government intentionally provokes defendant's successful motion for mistrial); *Illinois v. Somerville*, 410 U.S. 458, 461 (1973) (reprosecution barred following declaration of mistrial over defendant's objection, absent "manifest necessity" for mistrial); *Fong Foo v. United States*, 369 U.S. 141 (1962) (per curiam) (double jeopardy applies where trial judge directs jury to "acquit" and enters judgment of acquittal long before government rests its case, even though "egregiously erroneous").

Independence "stated solemn objections to the King's . . . 'depriving us in many cases, of the benefits of Trial by Jury, and to his transporting us beyond Seas to be tried for pretended offenses.'" *Id.* It was partly in response to those objections that the venue and vicinage provisions of Article III and the Sixth Amendment were enacted. *Id.* 152-53. The right "was considered so important to liberty of the individual that it appears in two parts of the Constitution." *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

An essential aspect at common law of trial by jury was the right to be tried in the venue and vicinage where the crime was committed. The First Continental Congress "unanimously resolved" that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." *Capital Traction Co. v. Hof*, 174 U.S. 1, 6 (1899) (quotation omitted). Justice Story wrote:

> By the common law, the trial of all crimes is required to be in the county, where they are committed. Nay, it originally carried its jealousy still farther, and required, that the jury itself should come from the vicinage of the place, where the crime was alleged to be committed. . . . It was doubtless by analogy to this rule of the common law, that all criminal trials are required to be in the state, where committed.

3 Joseph Story, *Commentaries on the Constitution of the United States* § 1775 (1833); *see also* 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769).

These rights were viewed as being of such critical importance that the Jury Clause of the Sixth Amendment was added after "fears were expressed that Article III's provision failed to preserve the common-law right to be tried by a 'jury of the vicinage.'" *Williams v. Florida*, 399 U.S. 78, 93 (1970). The importance of the safeguard in Article III against the "unfairness and hardship to which trial in an environment alien to the accused exposes him" was thus "underscored" and "reinforced" by the provision of the Sixth Amendment requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed." *United States v. Johnson*, 323 U.S. 273, 275-76 (1944); *see also United States v. Wood*, 299 U.S. 123, 142-43 (1936) ("The Sixth Amendment provided further assurances [beyond those provided by Section 2 of Article III]. . . . These [additional] requirements . . . are all of first importance.").

c. Consistent with those historical practices and purposes of the venue and vicinage rights, this Court for a century and a half has acknowledged, without fail, the important role played by those rights in preventing prosecutorial abuses and preserving the fundamental right of trial by jury. *See, e.g.*, *Gut v. Minnesota*, 76 U.S. 35, 37 (1869) ("Undoubtedly the provision [of the state constitution] securing to the

accused a public trial within the county or district in which the offence is committed is of the highest importance. It prevents the possibility of sending him for trial to a remote district, at a distance from friends, among strangers, and perhaps parties animated by prejudices of a personal or partisan character. . . ."). The Brief in Opposition in no way acknowledges the importance of the right at stake or its fundamental character.

d. The government also argues that defendants are not entitled to a pretrial determination of contested venue because no court has held that such a hearing is required. BIO 10. But this Court has not hesitated in recent Terms, even in the face of contrary precedent, to interpret the meanings of the enumerated guarantees of the Sixth Amendment in accordance with historical background and practices.

In *Crawford v. Washington*, 541 U.S. 36, 43-50 (2004), this Court exhaustively examined the historical background of the Sixth Amendment's Confrontation Clause to understand its meaning. Based on that historical analysis, the Court interpreted the Confrontation Clause based on the Sixth Amendment *as the Framers would have understood it and intended*. *Id.* 50-56. In doing so, the Court rejected a consistent, though recent revision of Sixth Amendment doctrine.

Similarly, in *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004), interpreting the Sixth Amendment, this Court reaffirmed its commitment to *Apprendi v.*

New Jersey, 530 U.S. 466 (2000), as providing "intelligible content to the right of jury trial[,]" without which "the jury would not exercise the control that the Framers intended." Petitioner does not invoke those cases for their holdings (*compare* BIO 18), but rather for their spirit – that the Court should take up the present case to continue on the course of enforcing the Sixth Amendment according to the Founders' purposes. *Cf. Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.").

Here, both historical understandings and this Court's own decisions regarding past abuses indicate that, where venue is contested on factual grounds before trial, full preservation of the Sixth Amendment and Article III venue and vicinage rights requires a pretrial evidentiary hearing.[2] The government's claim that no contemporary court has required such a hearing is not sufficient to overcome the great weight that has historically been accorded to these fundamental rights.

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[2] Most questions about venue in criminal cases concern the determination of the correct legal rule. It is uncontroversial that such questions are decided by the court on pretrial motion. The issue presented here arises when the *rule* for determining venue is undisputed (*e.g.*, "legal residence," as defined in tax law), but the *facts* that would identify that place are in dispute.

e. The government implies there was no harm caused by depriving petitioner of his constitutional rights because it is "highly improbable" he would have prevailed during a pretrial venue hearing. BIO 13-14 n.3.[3] Petitioner does not agree that a defendant's constitutional right to trial in a proper venue can be nullified based on a one-sided prediction of failure, before even being given the opportunity to vindicate that right in an adversarial setting.

The factual record demonstrates that venue was vigorously disputed from the earliest stages of the case. The evidence proffered by the government as posing the greatest obstacle to petitioner's venue contention is a position he took, in challenging a New York Family Court's assertion of personal jurisdiction over him, in defense of interstate enforcement of an Indiana child support claim – an action later dismissed as wholly baseless. BIO 13 n.3, *citing* Gov't CA11 Br. 49 n.11. Unmentioned is that the prosecutorial pretrial motion on which footnote 11 of the government's appellate brief relied (D.Ct. Doc. 303) was dismissed as moot and therefore never adjudicated (*see* D.Ct. Doc. 332, at 8), and that in answering the government's motion the defense pointed out that the New York court, after a hearing, *rejected* the defendant's position and held him subject to personal jurisdiction

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[3] The Brief in Opposition fails to address petitioner's argument that trial before a constitutionally incompetent jury is structural error, Pet. 26, which would render moot the government's prediction.

there. D.Ct. Doc. 308, at 2-3. Petitioner also noted that "[a]ll of his formal tax returns have always declared New York City as his legal domicile." *Id.* 2.

The government also proffers two magazine articles describing the house petitioner arranged to have constructed in Windermere, Florida. But those articles (which do not appear in the record, despite the government's reference to what "the record [does or] does not suggest," BIO 13 n.3), even if taken as admissible proof, are not the compelling evidence of petitioner's place of residence the government claims. Neither calls the Florida house "his home," as does the government's footnote. To the contrary, the articles revealed that petitioner had "spent just five weeks in Florida last year[,]" apparently referring to 1996, and "[t]hey were, quite literally, a retreat[,]" and that he "has entertained [friends] only once in Florida." *Architectual Digest*, Apr. 1997, at 216. Some nine months passed between when petitioner discussed the house with his designer and he next saw the house or the designer again, *Ebony*, Nov. 1997, at 195, and he "does not spend as much time as he would like in his Florida hideaway. . . ." *Id.* 198. The cover article in the same issue quotes Mr. Snipes as stating that "he lives a 'very simple, down-to-earth' lifestyle between homes in Los Angeles, New York and Florida." *Id.* 189-90. Nowhere is he quoted as saying, nor does either article as a whole imply, that the Windermere house was his principal or permanent abode.

Even more important, the government fails to acknowledge that the articles were written in 1997, several years before the dates (in 2000-2002) of the alleged willful failures-to-file for which petitioner was indicted. As such, they have little bearing on whether Florida was petitioner's "legal residence" for purposes of determining venue for each count.

At the time of the Founding, a determination of legal domicile was unlikely to change during an adult's lifetime. Modern Americans, by contrast, are mobile. The government's suggestion that the venue issue would not likely have been resolved in petitioner's favor had the requested pretrial evidentiary hearing been allowed is not only constitutionally immaterial, it is also wrong.

To address the important constitutional issue presented in this petition, a writ of certiorari should be granted.

2. Petitioner's argument regarding the proper standard of proof was sufficiently preserved to permit this Court's review.

The Brief in Opposition agrees with petitioner that every Circuit applies a preponderance standard for proof of venue, and does not deny that all of those cases lead back to a single Eighth Circuit precedent which fails utterly to support the lower courts' shared assumption. Pet. 29-31. Nor does it describe the issue as unimportant; it hardly could. Rather, the government contends this case would be a "poor vehicle" in

which to consider the proper standard of proof for venue determinations because "petitioner did not properly preserve his claim" and this Court's review would thus be limited to plain error. BIO 19.

a. The government does not deny that the burden issue was properly presented on appeal and addressed there. *See United States v. Jimenez Recio*, 537 U.S. 270 (2003) (sufficient preservation of appellate issue made futile by Circuit precedent).

b. The government also disregards several of petitioner's other contentions demonstrating sufficient preservation of this argument. Petitioner notes that, in the similar case of *United States v. Gaudin*, 515 U.S. 506 (1995), for example, this Court fully addressed the merits of a fundamental Sixth Amendment issue arising out of a jury instruction despite the issue's having arisen in a plain error posture because any objection lodged at trial would have fruitlessly challenged settled precedent. Pet. 34; *see also id.* n.28. Petitioner also argues, with detailed record support, that the difference in burdens of proof could not be deemed harmless, even if the error were not treated as structural on plain error review. *Id.* 35.

c. In fact, petitioner's case would be a "good vehicle" for addressing the proper standard of proof insofar as the factual record clearly demonstrates that venue was a hotly contested issue throughout the proceedings below. Even if the jury might have been justified in ruling for the government on a

preponderance standard, Pet. App. 20 n.7, a rational jury would necessarily have entertained at least a reasonable doubt about venue for the failure-to-file counts. This Court therefore need not conduct a fact-intensive review of the record to determine if the contested legal question is either ripe or harmless here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectively submitted,

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